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IN THE

Supreme Court Of The United States

October Term, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

Reply Brief

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ARGUMENT

I. The Federal Question Was Properly Presented to and Ruled Upon by the Supreme Court of Alabama.

Appellee's argument in support of its Motion to Dismiss suggests that the federal question before this Court regarding the constitutionality of § 12-22-72, *Code of Alabama* (1975) was not properly raised or ruled upon by the Supreme Court of Alabama. This superficial suggestion has no support in and is contradicted by the opinions and orders of the Supreme Court of Alabama in this action.

There can be no dispute that the Supreme Court of Alabama's first opinion of September 19, 1986 affirmed the judg-

ment of the trial court on the issue of the liability of Alabama Power Company in this action. App. A, A-11.[1] This is also confirmed by the Alabama court at the outset of its second opinion of May 22, 1987. App. B, A-13. As the appellee concedes, the only purpose for the remand to the trial court upon the entry of the first opinion was for the trial court to articulate its reasons for refusing to grant a new trial or remittitur on the ground of the excessiveness of the $1 million verdict.[2]

Because the first opinion represented an affirmance of the judgment as to liability, Alabama Power Company timely filed its Application for Rehearing, which, among other issues, raised the federal question regarding the constitutionality of § 12-22-72. App. G, A-41-43. It also filed a brief addressing *all* issues raised in the Application. App. G, A-44-67. During the pendency of the remand, the Supreme Court of Alabama did not rule upon the Application for Rehearing but held it for ruling at the time of its review of the trial court's opinion and the issuance of its second opinion. App. B, A-13. In its second opinion, the Alabama court states that this federal question has been raised pursuant to a "timely filed" Application for Rehearing. App. B, A-13-14. While this opinion expressly addresses the issue of liability and refers to the issue of the constitutionality of the punitive damage award, both of which were also presented in the Application for Rehearing, it does not expressly state its opinion on the constitutionality of § 12-22-72. *However,* the Alabama court expressly ruled upon *all* issues presented in the Application for Rehearing as follows:

> "Based on the foregoing, we are of the opinion that the application for rehearing is due to be overruled."

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[1]"App." refers to the Appendix to Alabama Power Company's Jurisdictional Statement.

[2]The remand was ordered in accordance with the procedure required in *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), which mandated that a trial court articulate its reasons for granting or denying a new trial or remittitur on the grounds of excessiveness or inadequacy of the verdict. Here, the trial judge was required to state its reasons for overruling Appellant's Motion for New Trial or Remittitur. App. D, A-36.

App. B, A-13-22. Notwithstanding Appellee's suggestions, the Alabama court gave *no* indication that *any* of the issues presented in the Application for Rehearing were premature or could not be effectively ruled upon at that stage of the proceeding so to obviate the need for the filing of an additional Application for Rehearing addressing the same issues. Moreover, the Supreme Court of Alabama's refusal to express its opinion on this issue is not improper or unexpected for it has repeatedly overruled, *without opinion*, Applications for Rehearing presenting the same federal question.[3] Therefore the actions of the Supreme Court of Alabama here clearly demonstrate that the issue was before the court and was rejected which satisfies this Court's requirements that the issue be raised *or* passed upon (here overruled) by the State court. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *Hill v. California*, 401 U.S. 797, 805 (1971).

Appellee's suggestion that the state court must *expressly* pass upon the federal issue finds little support in other decisions of this Court. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), Justice Powell delivered an opinion which decided a due process issue not expressly ruled upon by a state supreme court. Regarding the state court's silence on the federal question, the Court stated:

> On the record in this case, *despite the State Supreme Court's failure to address the constitutional issue, it is clear*

[3]Appellee refers to several recent decisions of the Supreme Court of Alabama involving *Hammond*-type remands in contending that this issue could only be presented by an Application filed following the second opinion. Appellee's Motion to Dismiss, p. 5, n.3. However, these cases provide *no* support for appellee's arguments. In *none* of these cases did the Supreme Court of Alabama rule on an Application for Rehearing in its second opinion following the *Hammond* remand, as was the case here. Moreover, in the only two cases in which the constitutionality of § 12-22-72 was presented by Application for Rehearing, the Supreme Court of Alabama overruled the Application by separate order *without* opinion. *Reinhardt Motors, Inc. v. Boston*, No. 85-6, second opinion May 15, 1987, app. for rehearing overruled September 4, 1987; *Dependable Ins. Co. v. Kirkpatrick*, No. 85-1150, second opinion June 26, 1987, app. for rehearing overruled September 18, 1987.

> *that Chambers asserted denial of due process . . .* after the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressing almost entirely to the claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted . . .

410 U.S. at 290, n. 3 (emphasis added).

Similarly, in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court noted:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, *but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.*

278 U.S. at 67. (footnote omitted) (emphasis added). *Zimmerman* raised the question of the constitutionality of a state statute. *Id.* Although the state court did not expressly rule upon the federal constitutional challenge, this Court stated:

> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*

Id. (footnote omitted) (emphasis added).

The express language of the Supreme Court of Alabama's second opinion here demonstrates its intent to affect a final disposition of the issues raised in Alabama Power Company's Application for Rehearing. It was therefore proper and, indeed, appropriate for the Appellant to rely upon this ruling and proceed with this appeal.

II. Appellee's Argument on Jurisdiction, if Accepted, Would Render a Wasteful and Unjust Result.

Appellee's suggestion concerning the jurisdiction of this Court, if accepted, could render a wasteful and unjust result. To conclude that Alabama Power Company should have filed another Application for Rehearing on this federal issue, only to have the same overruled, without opinion, as the Supreme Court of Alabama has traditionally done, would be totally inconsistent with the interests of judicial economy and avoiding unnecessary delay and waste upon appeal. There is nothing that prevented the Alabama court from holding the Application for Rehearing for consideration and ruling at the time of its second opinion and the appellee offers no suggestion to the contrary.

This Court has previously demonstrated its desire to avoid roundabout and wasteful procedures in the interest of justice in addressing similar constitutional issues. *Mills v. Alabama,* 384 U.S. 214 (1966) involved a constitutional challenge to a state statute which prohibited newspaper editorials, which urged the public to vote in a certain way, from being published on election day. *Id.* at 215. The trial court ruled in favor of the editorialist based upon the First and Fourteenth Amendments to the Constitution. The Supreme Court of Alabama reversed and remanded to the trial court with directions. *Id.* at 216. The editor appealed to this Court, and the State moved to dismiss for lack of jurisdiction claiming that the judgment of the state court was not final. *Id.* at 217.

This Court provided the following reasoning:

> The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered "final." This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he

> therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. *Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.* The language of § 1257 as we construed it in *Pope v. Atlantic Line R. Co.*, 345 U.S. 379, 381-383, does not require a result leading to such consequences. See also *Construction Laborers v. Curry*, 371 U.S. 542, 548-551; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72-74. Following those cases we hold that we have jurisdiction.

Id. at 217-218 (footnote omitted) (emphasis added).

This Court's reasoning in *Mills* is equally applicable here for the filing of a second Application for Rehearing would have simply resulted in yet another order overruling the application, with the resulting "waste of time and energy". The Supreme Court of Alabama exercised the opportunity to act upon Alabama Power Company's Application for Rehearing in conjunction with its affirmance of its judgment as to damages. Accordingly, in the interest of justice, it must be concluded that the necessary prerequisites have been satisfied to invoke the jurisdiction of this Court for consideration of this federal question.

III. The Federal Question is Substantial.

This Court recently declared that the identical federal question presented herein is an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, slip op. at 14 (1986). Apellee has either overlooked this recognition or wishes to ignore it in arguing that this issue is not substantial.

Even more recently, in *Bankers Life & Casualty Company v. Crenshaw*, No. 85-1765 (prob. juris. noted March 9, 1987), this Court noted probable jurisdiction to review two federal questions, one of which is a constitutional challenge to the Mississippi affirmance penalty statute, *Miss. Code Ann.*, § 11-3-23 (Supp. 1986). Contrary to the Appellant's contention, the Mississippi affirmance penalty statute does not differ in substance or effect from the Alabama statute in question. Admittedly, *Miss. Code Ann.*, § 11-3-23 (Supp. 1986) applies to all money judgments, while § 12-22-72, *Code of Alabama* (1975) applies to all money judgments which have been stayed or superseded. However, the denial of equal protection under the law is the end result of both statutes. The distinction in application of these statutes is *not* a distinction for purposes of the federal question herein presented and the unconstitutional result is the same: the affirmance penalty penalizes defendants who pursue non-frivolous appeals unrelated to costs imposed on the plaintiff[4] and allows plaintiff-appellants to take frivolous appeals without the risk of any comparable penalty or cost. In this manner, both the Mississippi statute and § 12-22-72 deny defendant-appellants the equal protection guaranteed by the Fourteenth Amendment of the Constitution.[5]

Appellant does not dispute that strict scrutiny is not required here, but emphasizes that § 12-22-72, like the Mississippi statute, bears no rational relationship whatsoever to the purported state ends of discouraging frivolous appeals and providing additional damages for affected plaintiff-appellees.[6]

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[4]The defendant is, of course, obligated by statute to pay post-judgment interest (12%) to the plaintiff-appellee as compensation for delay in execution on a money judgment. § 8-8-10, *Code of Alabama* (1975).

[5]Appellee also suggests that this Court's decision in *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916) is authority for the constitutionality of § 12-22-72. However, it is clear that this Court did not address in *Stewart* the equal protection claim now presented for resolution in this action.

[6]*Montgomery Light & Water Power Company v. Thombs*, 204 Ala. 678, 684, 87 So. 205, 211 (1920) and *City of Birmingham v. Bowen*, 254 Ala. 41, 47, 47 So. 2d 174, 180 (1950) set out these purposes as purported justi-

Appellee's argument that this federal question is insubstantial because § 12-22-72 has been abrogated by the Alabama legislature is absurd, for in fact the abolishment of the statute serves to support Appellant's position rather than undermine it. Admittedly, Alabama has amended § 12-22-72 to eliminate completely the 10% penalty, effective June 11, 1987. 1987 *Ala. Acts* No. 87-188. Although Appellant does not purport to put itself into the mind of the state legislature, it can only reasonably conclude that the Alabama legislature recognized the invalidity and inherent unfairness of the non-discretionary affirmance penalty statute and therefore eliminated it. However, the abrogation of § 12-22-72 *in no way* negates the wrongful application of such penalty against Alabama Power Company, which is now exposed in this case to a 10% penalty of $100,000, which results in a violation of Appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

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fications for the affirmance penalty statute. Appellant has addressed this issue in its Jurisdictional Statement, at 10-12.

CONCLUSION

For the foregoing reasons, as well as those presented in Appellant's Jurisdictional Statement, Appellant's Motion to Dismiss should be denied and the jurisdiction of this important federal question should be noted by this Court.

Respectfully submitted,

October 6, 1987

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